Neutral Citation Number: [2020] EWHC 1462 (Admin)

Case No: CO/3864/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 June 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

KN	**Appellant**
- and -	
SOKOLOV DISTRICT COURT, CZECH REPUBLIC	**Respondent**

- -
- -

MARK SMITH for the **Appellant**

Hearing date: 4 June 2020

Judgment as delivered in open court at the hearing

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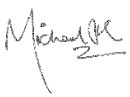
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 5th June 2020 at 10am.

MR JUSTICE FORDHAM :

Introduction

1. This renewed application for permission to appeal was a telephone conference hearing. It and its start time were published in the cause list with contact details available to anyone who wished to participate. I heard oral submissions just as I would have done in the court room and I am satisfied of the following: this constituted a hearing in open court; the open justice principle has been secured; no party has been prejudiced; and insofar as there has been any restriction on a right or interest it is justified as necessary and proportionate. At the hearing an application was made for an anonymity order, and I made a provisional order for anonymity. I am going to continue that order for reasons I will give later. The appellant is wanted for extradition to the Czech Republic in conjunction with two EAWs (European Arrest Warrants), each of which is a conviction warrant. One of the warrants involves a custodial sentence of 18 months. The other involves a custodial sentence of 10 months, suspended and not yet activated. As the respondent has accepted in written submissions, the district judge made a factual error in referring to the 10-month sentence as already having been activated. It is also common ground that the currently-suspended 10-month sentence is properly the subject of extradition action and the case of Murin v Czech Republic [2018] EWHC 1532 (Admin) was referred to. The appellant relied on Amended Grounds of Appeal dated 14 November 2019, supplemented by oral submissions, and accompanying further evidence. I decided to consider all the written and oral submissions, and all of the evidence in the case including the fresh material, to evaluate on the substantive legal merits whether there was any reasonably arguable ground. Having done so, I have reached the same conclusion as did Eady J on the papers, namely that there is no reasonably arguable ground of appeal in this case. The fresh evidence is incapable of being 'decisive' and I will formally refuse both permission to appeal and permission to rely on it.

Article 3

2. The essence of the appellant's submissions in reliance on ECHR article 3, as presented and as I saw it, involved three steps. (1) On the evidence, the appellant is an individual in need of protection in custody, there being a proper evidential basis for his assertion that he has previously acted as a police informant which would place him in personal physical peril upon incarceration in the Czech Republic. (2) On the evidence, whilst the Czech authorities would be able to protect his personal safety, there is a proper evidential basis for the conclusion that they would refuse to do so in the light of their formal response in these proceedings, which takes the clear position the appellant has never been a police informant. (3) On the evidence, even if (2) were wrong, and even if the Czech authorities did act to protect his personal safety from threats during incarceration, that would involve protective custody of a nature which calls for specific further information before a conclusion on article 3-compatibility of extradition can properly be arrived at.

3. The district judge found against the appellant as to step (1). The appellant gave oral evidence that, during a sentence of imprisonment in 2010, he had encountered violence by reason of the fact that he had previously been a police informant. His evidence was that he had acted as 'a police informant' in respect of local drug gangs over a course of more than a decade, suffering violence and threats as a result. His

case was that both he and members of his family had suffered acts of violence and threats after his release. He sought to adduce, very late, some untranslated social media messages from 2019, which the district judge declined to admit into evidence, but which the appellant was permitted to refer to in his oral evidence. His evidence about those 2019 social media messages was, as the judge recorded, that they were of a menacing nature and supported his evidence relating to events concerning a criminal gang at that time. The judge had, and relied on, further information from a judge in the Czech Republic which stated that the appellant "is and never has been a police informant" which the judge said "it could not have been clearer". The judge concluded that the judicial authority "has stated unequivocally that [the appellant] is not and has not been a police informant". He concluded that the appellant "has not been able to show that he would be a vulnerable inmate".

4. The position before me is as follows. The appellant has put before me translations of the social media messages from 2019 which he had described to the judge, from their non-admitted and un-translated format, in his oral evidence. Those messages as translated do indeed contain content of a menacing nature and support the description of the relevant conduct of the criminal gang at the relevant time. They do not, however, support the contention that threats were being levelled at the appellant or his family on the basis of him being a police informant. There is a hint in one of those messages, and a question in another of them, but it does not provide evidential support for that conclusion. The appellant has also put before me translations of social media messages from 2017. On the face of it, these are communications between the appellant and the person who he had named as one of the two police officers to which he provided information over a period of time. I accept that, on the face of them, those translated messages from 2017 indicate the ongoing provision to the police of information about criminal activity.

5. On the basis of that material, Mr Smith submits that the respondent has missed the point in focusing on whether the appellant has been a "police informant", and whether there has ever been "a formal arrangement with him to provide information". In further information dated 9 December 2019 from the district court it is recorded that the named police officer has stated that the appellant "had never been a police informant and that there had never been a formal arrangement with him to provide information". That, says Mr Smith, misses the point. It does not deny that information had been supplied, as the social media messages support. The question of imperilment in incarceration will not turn on technical issues as to the definition of "police informant", still less on the existence or otherwise of any "formal arrangement". I have some sympathy with the respondent in relation to this matter. The point had and has continued consistently to be put forward, by and on behalf of the appellant, on the basis that he was a "police informant"; not that he had 'provided information'. It is unsurprising that the responses have focused on the status of "police informant". I think it right, however, to put that debate to one side and look at the substance of the position, as it is on the evidence before me. I accept that there was an evidential basis for the contention that the appellant had provided information to the police over a period of time, that he did so to a named police officer who he was able accurately to identify, and that he was telling the truth about that matter. I accept, at least as reasonably arguable, that that brings into question whether the article 3 issue could be disposed of – at least as things now stand – by reference to the judicial authority

having "stated unequivocally that [the appellant] is not and has not been a police informant".

6. That, however, only takes the appellant so far. His case is that he is known and perceived to have been a police informant, that this has imperilled himself and his family, that there was past ill-treatment in incarceration in 2010 and thereafter, and that he is at risk of facing future violence and threats, as a known and perceived police informant. There is no evidential support in the materials before me for that wider contention. Whether he provided information to the police in the past is one thing. Whether he has suffered and stands to suffer threats and violence at the hands of those who know or perceive this is what really matters. The translated social media messages do not support that.

7. It is, moreover, at this point that a link can properly be made to another way in which the appellant sought to rely on violence that he said he had encountered in 2010. His case was that he had also encountered violence and discrimination "by reason of what he described as his 'very dark skin'". The judge dealt specifically with that point. He said this: "At this point I consider it necessary to consider [the appellant's] repeated assertion that he suffered discrimination (with accompanying threats and violence) by reason of his skin colour. This court – as well as counsel and others in court for the full hearing – have had ample opportunity of carrying out a visual assessment of the requested person during the course of the full hearing. It is very clear to the naked eye that [the appellant] does not have what could reasonably be described as 'dark skin', let alone 'very dark skin' (as he describes in his proofs of evidence). His skin colour appears that of an average white man". Self-evidently, there are acute sensitivities about the issue of discrimination and ill-treatment, and skin colour, which would ordinarily no doubt make it inappropriate for a court to approach such an issue by reference to a judge's assessment of shade of skin colour. A criticism along those lines is advanced, in writing, in the grounds of appeal by Mr Smith. I accept of course that there can be dangers in a court approaching an individual's story about the experience of discrimination, by focusing on skin tone as it appears to the judge. But in this case the nature of the issue was a very particular one. It was the appellant's case that he had suffered discrimination by reason of the fact that he has "very dark skin". In my judgment, the judge was entitled to address the very specific point that was being made, in the way that he did.

8. This is an issue relating to fundamental human rights, and this is a permission to appeal hearing. In those circumstances, I am prepared to proceed on the basis that the appellant – although not in any formal sense "a police informant" – is a person who has in the past supplied information to the police; and to approach the case on the basis that there may in the event be a relevant possibility that others within a prison may come to know or perceive that. That is the approach I will adopt. All of that goes to step (1), but it still leaves steps (2) and (3). The appellant needs to show a reasonably arguable case by reference to one of those.

9. I cannot accept that step (2) of the article 3 complaint is reasonably arguable. The respondent, as I have indicated, has addressed the question of whether the appellant was ever a "police informant". That is the way his case was put. It is a leap in logic to proceed from the fact that they have responded in that way, to the conclusion that the protection which Mr Smith acknowledges is available within the prison system and can be provided in an appropriate case would be denied to the appellant, were he to be

a vulnerable inmate. I can find no proper evidential support for that contention. The objective materials, including a CPT Report to which I will come, reflect the fact that protective arrangements are available within the custodial system. As I have said, Mr Smith accepts that the authorities are able to provide protection.

10. The circumstances described as having arisen in 2010 provide no support to the appellant. His own case is that he did not report threats or attacks, as the judge pointed out. There is no material which supports the contention that, were he a vulnerable inmate facing threats and assaults, he would not be protected. The judge, having referred to the respondent's confirmation that the appellant was not a "police informant", expressed this further finding: "I am satisfied that not only are the Czech authorities aware of their on-going article 3 obligations regarding [the appellant], but that they will abide by such obligations". He then said: "accordingly this challenge must fail". In other words, the judge did not stop at the point relating to police informant, or the point relating to skin colour. He addressed the question of ongoing need for protection and whether he could be satisfied that protection would be provided, were it needed. That conclusion, in my judgment, was a justified one and there is no material to undermine it, or to support a contrary conclusion, or to call for yet further information.

11. That is not the end of the article 3 point. Mr Smith still has step (3), were he right about step (1) but wrong about step (2). His position on step (3), which the respondent in its written submissions has squarely disputed, comes to this. A CPT Report dated 4 July 2019 describes at paragraph 46 a case of protective custody. The report says: "Particular reference should be made to the situation of a sentenced prisoner placed for his own protection in the admission unit of Mirov as he had previously been repeatedly physically attacked by other inmates. For two months prior to the visit, he had been held in a single-occupancy cell and his only activity had been one hour of outdoor exercise a day, which he had taken alone. He had been provided with virtually no human contact and had thus been held in conditions akin to solitary confinement. This is unacceptable." Mr Smith's submission to me was that that passage, at least reasonably arguably, is capable of constituting what the authorities describe as "objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing member state that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention", so as to call for an individualised enquiry with further information relating to the two prisons which it is envisaged are direct candidates for the appellant's incarceration, neither of which are Mirov.

12. I cannot accept that submission. In my judgment, the key passage in the CPT report is quite incapable of constituting evidence which calls for further information as being necessary. Moreover, the respondent has responding to this specific point in written submissions dated 5 January 2020. The respondent submits that the the passage relied on referred to a single prisoner in solitary confinement for his own protection, and there was "nothing to suggest such a practice is widespread or commonplace". I agree. The CPT Report does not express any such view. Secondly, the respondent explains that the Czech Republic government formally responded to this part of the CPT report explaining that: "This was a case of a convict who, at the time of the CPT's visit, was placed alone in the admission unit cell intended for two convicts and

refused to visit the culture room and rehabilitation programme activities because he feared for his life. When another convict was placed in a cell with this person, there were frequent convict, which culminated even in a criminal prosecution for attempted rape. The convict is now accommodated with another convict in a cell for two; he is assigned to the working skills and documentary club programs. However, according to the evaluation, he attends the rehabilitation programs very rarely or not at all". Mr Smith cited Purcell [2017] EWHC 1981 (Admin) at paragraph 18, in which it was said that "there is no evidential threshold to be crossed" before a court decides that there is "a need to seek further information". That observation was made in response to an argument that, because the court had decided to ask for further information, it followed that the court must have concluded that there was a properly evidenced real risk of article 3 breach. In the present case there is, in my judgment, beyond reasonable argument, no 'objective, reliable, specific or properly updated evidence' of a real risk of breach of article 3 to require a further enquiry; nor a "need to seek further information".

Anonymity

13. I said at the outset that Mr Smith applied at the hearing for an anonymity order. I am conscious that, as Lane J said in BM v Ireland [2020] EWHC 648 (Admin) [2020] 4 WLR 70 at paragraph 13: "As a general matter, a very good case indeed will need to be made, in order for a person who has … been convicted of a criminal offence abroad, and whose return is sought by the country of conviction, to avoid being named in an extradition judgment, given in England and Wales". I was, and remain, satisfied that such an order is justified in this case. That is because this judgment necessarily involves addressing evidence as to the appellant having provided information to the police. I was and remain concerned that the appellant's pursuit of his access to justice to this Court, and the ventilation of his article 3 argument, should lead to the publication to the world of the fact of cooperation with the police, linked to his identity. I am satisfied, in the special circumstances which relate to a fear of physical harm, necessitating protective arrangements in custody, that an anonymity order is necessary, justified and proportionate. But I have included within the order liberty to apply to allow the respondent, any representative of the media or any other interested person to seek to argue subsequently to the contrary. I do not regard there as being a conflict between (a) accepting the basis for the anonymity order and (b) rejecting the Article 3-compatibility of extradition surrender. The fact that, were the appellant to face threats in incarceration, he would be given protective custodial arrangements compatibly with Article 3 standards, does not mean that the publication of his identity should promote the need for those arrangements, by publishing the fact of the past cooperation with the police, which it was necessary for him to ventilate in pursuit of a human rights argument before this Court. It is not necessary or appropriate for access to justice to come at such a price, particularly where the Court accepts that the evidence shows that there was cooperation with the police, but rejects the claim for other reasons.

Article 8

14. The essence of the article 8 argument, as it was put to me in writing and orally, and as I saw it, came to this. It is true that this is a case involving 'private life', which can properly be described as 'limited'. The appellant has been in the United Kingdom since November 2018. He has been employed here and has an intention to bring his 3

children from the Czech Republic here. The position in relation to the 10 month currently-suspended sentence is that it is impossible to say whether or not that period will need to be served. In those circumstances, it is fair and sensible primarily to focus on the 18-month sentence, and it was a material error for the judge to treat the 10-month sentence as if it had been activated. Time served on remand in the United Kingdom to the present time has the consequence that, focusing solely on that 18-month period of custody, the period to be served would now be some 4 months. A key factor in the present case is the relative lack of seriousness in the relevant underlying offending. The offences which are the subject of the two EAWs concern failure to ensure that children attended school. The relevant equivalent offence arises under section 444 of the Education Act 1996, and in the United Kingdom would attract a maximum sentence of 3 months custody. Notwithstanding the default position, as to the respect which the United Kingdom courts will pay to the sentencing decisions and policies of the courts of the requesting state, it is nevertheless relevant that the offending would be unlikely to lead to a custodial sentence, or only a very short one. The relative lack of seriousness moreover reduces the weight to be attributed to the public interest considerations in favour of extradition. The 'huge discrepancy' between Czech and UK sentencing in the present case materially counts in the appellant's favour in the article 8 'balance sheet'. Against that background, the limited private life arising in the present case, at least reasonably arguably, is capable of tipping the balance in the appellant's favour.

15. That was the essence of the argument. But I cannot accept it as reasonably arguable. It is true that the judge mistakenly referred to the 10-month sentence as not having been activated. In those circumstances, I have looked at all of the considerations again for the purposes of seeing whether there is a reasonably arguable basis for an article 8 claim to be sustained. In my judgment, there is not. It does not follow that because the 10 months sentence has not been activated, that is a sentence effectively to be put to one side and disregarded. It is therefore a false starting point to focus solely on the sentence for 18 months, and to calculate the implications of remand accordingly. In any event, the public interest considerations that arise point strongly to the applicant being required – under the relevant extradition mechanisms – to face up to his responsibilities through surrender to the Czech Republic and the serving of such custodial element as may remain. The Courts have repeatedly emphasised that the strong default position is that respect is to be paid to the sentencing decisions and policies of the requesting state, and that very limited import can be given to a comparison between that and what a UK court would do on sentencing and equivalent offence: see HH [2013] 1 AC 338 paragraphs 95 and 132, and Celinski [2016] 1 WLR 551 paragraph 13. This is not a case to which differences between UK and Czech sentencing can properly, clearly and materially, assist. A different comparison, not between UK sentencing and Czech sentencing, but between different offences and their relative seriousness, is one which can reduce the strength of the public interest considerations in favour of extradition: HH at paragraph 8(5). The judge, for his part, recognised this but said that the offending could not be regarded as "trivial". I agree. The private life considerations are rightly conceded to be limited. The judge rightly pointed out that the appellant: "has only been in the UK since November 2018 and has been in continuous prison custody here since 21 April 2019. His ties to the UK are very limited indeed. He is living here as a single man". It is appropriate to stand back and consider, on the basis of all the facts and circumstances, the overall evaluation: Love [2018] EWHC 172 (Admin) paragraph 26. In my judgment, it is not reasonably

arguable that surrender in this case would be a disproportionate interference with the appellant's article 8 rights.

Conclusions

16. For these reasons the application for permission to appeal is refused.

5 June 2020